IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL WRIT PETITION NO.1137 OF 2005

1. Shri Sanjay Vinze
2. Mrs.Ranjana Athalye
3. Dr.Mrs. Madhuri Lokapur
4. Dr.Avinash Gokhale
5. Mr.Tushar Deoras
6. Mr.Dilip Gundecha
7. Dr.Mrs.Aarti Prayag
8. Maj Shri Suresh N. Shah ..Petitioners.

V/s.

1. State of Maharashtra
2. Mrs. Charusheela M. Patwardhan
3. Ninad Patwardhan ..Respondents.

WITH
CRIMINAL APPLICATION NO.2141 OF 2005

Mrs.Charusheela Patwardhan ...Applicant.
V/s.
Mr.Sanjay Vinze and Others ...Respondents.

Mr.Samsher Garud i/b Khaitan & Jaykar for the Petitioner No.1.

Mr.Ashok Mundargi i/b Adv. Neha Bhide for the Petitioner Nos.2 to 8.

Rajesh Behere and Mr.Manohar Patwardhan for the respondents.

Ms.M.H.Mhatre, APP for the State.

Mr.Rajesh P. Behere for the respondent no.2.

CORAM: J.H.BHATIA, J.
DATE : 12TH April, 2007.

ORAL JUDGMENT:

1. Heard the learned counsel for the Parties.

2. Rule in Writ Petition No.1137 of 2005. With consent of the learned counsel for both the parties, matter is taken up for final hearing forthwith.

3. To state in brief, the respondent no.2 Charusheela Patwardhan is the complainant and the respondent no.3 is her son. The petitioner nos. 1 to 8 are the accused persons in the complaint filed by the respondent no.2, registered as Regular Criminal Case No.149 of 2005 in the Court of Judicial Magistrate First Class, Pune for the offences punishable under Sections 465, 467, 471 read with Section 34 and Section 120B of the I.P.C. For the sake of convenience, the respondent no.2 may be referred as the complainant and the petitioners may be referred as the accused persons. To state in brief the complainant and the accused persons are members of Himali Residential Co-operative Housing Society Ltd., Pune and all of them were members of the managing committee of the said society. The complainant had affixed and installed certain concrete benches within the campus of the society for the benefit of senior citizens, who were members of the society . However, on 2-11-2004 without any notice to the complainant, meeting of the managing committee was held illegally and it was decided to remove the said benches from the place where they were installed and to relocate

them in different parts of the campus. According to the complainant, when she came back from the pilgrimage, she came to know about this fact and several senior citizens, who were members of the society, made grievance that the facility available for them was illegally removed by the managing committee. Being aggrieved by this illegal action of the accused, complainant sent a letter of resignation dated 15-11-2004. According to her, regular monthly meeting of the managing committee was fixed on 23-11-2004 and for that meeting, notice was issued to all the members of the managing committee including herself on 19-11-2004. On a second thought, she decided to withdraw her resignation and in the evening of 21st November, she had a personal talk with the chairman of the managing committee on intercom and expressed her desire to withdraw the resignation. The chairman, i.e, accused no.1 Sanjay Vinze, assured her that it was his prerogative to accept or not to accept resignation and he was not going to accept the resignation. Anyhow, she gave a letter in writing about withdrawal of the resignation. As per the notice dated 19-11-2004, she went to attend the regular monthly meeting of the managing committee on 23-11-2004 but as soon as she went there, accused no.1 Sanjay told her that her resignation was already accepted and she could go. By this she was

shocked. However, while leaving she was asked to put signatures on the minutes of the earlier meetings dated 2nd November, 2004 and 12th November, 2004. She put signatures on the minutes pertaining to the meeting dated 12th November, 2004 but as far as the proceeding of 2nd Nov., 2004 is concerned, she remarked that she was not present in the said meeting. According to her, she was also shown as present in the said meeting of 23rd as a member. Later on, by the letter dated 26th November, she was informed that her resignation was accepted in the special meeting of the managing committee held on 21st November, 2004. According to her, when she had been to the office of the society on 23rd November to attend the meeting, the minutes pertaining to the meeting of 21st November, 2004 about acceptance of her resignation were not shown and were not in the book. According to her, the minutes about meeting dated 21st were forged and fabricated by the accused persons just to see that she would not come back as a member of the managing committee. With these allegations, the complaint was filed by the complainant through her son Ninad, respondent no.3, as duly constituted power of attorney holder for the complainant. The complaint was filed on 3rd January, 2005. Verification statement of Ninad, respondent no.3, was recorded on 8-2-2005 and after the verification

process was issued by the learned J.M.F.C., Pune against all the accused persons for the offences punishable under Sections 465, 467, 471 read with Section 34 and 120B of the I.P.C.

4. In this writ petition accused persons have challenged the issuance of process and they seek to quash the proceeding on the basis of complaint lodged by the complainant through her power of attorney holder. It is the contention of the accused/petitioners that even according to the allegations made in the complaint, meeting held on 2-11-2004 was not illegal and proceeding could not be treated to be fabricated or forged. It is contended that as in that meeting dated 2nd November the subject in which the complainant was personally interested, she could not remain present in view of bye-law no.121 and therefore, notice was not issued to her. Anyhow, legality or otherwise of the meeting could be challenged before the appropriate forum under the Maharashtra Co-operative Societies Act. It is further contended that in view of the same bye-law it was also not necessary to issue notice to her about the meeting of the managing committee, which was held on 21st November, 2004 for the consideration of her resignation. It is contended that on 18th November, 2004 a notice was issued to all the members of the managing committee,

except the complainant, for the special meeting of the managing committee to be held on 21st November to consider resignation of the complainant and as she could not remain present in the meeting as per the bye-law no. 121, notice was not given to her. The meeting was attended by all 8 members of the managing committee and only the complainant being the 9th member was not present. It is denied that proceedings pertaining to 21st November, 2004 were fabricated later on. It is contended that in view of these circumstances, no criminal case was made out and therefore, proceeding based on the said complaint was liable to be quashed. It is further contended that from the facts disclosed in the complaint as well as verification statement made by the respondent no.3, it appears that the complainant had personal knowledge about certain facts lodged in the complaint and about those facts her son could not verify and therefore, on the basis of verification statement made by him, the process could not have been issued. Therefore, it is contended that, process issued by the learned Magistrate is liable to be quashed.

5. Mr.Mundargi the learned senior counsel for the petitioner/accused has taken me through the record in detail. Mr.Behere with Mr.Patwardhan, the learned counsel for the respondents also referred to several

parts of the proceeding book and other records in support of his contention. Bye-law No.121 provides that no member of the committee shall be present at the consideration of any matter in which he is directly or indirectly interested. After some arguments, Mr.Mundargi conceded that it is the disputed question as to whether by virtue of this bye-law , the complainant could be deprived of attending the meeting held on 2nd November and again on 21st November. However he contended that at the most it could be stated that meetings were illegal but no offence could be made out particularly about fabrication of record or forgery. On the other hand, the learned counsel for the complainant vehemently contended that in the minutes about the proceeding of the meeting of 23rd November, the complainant was shown present as member of the managing committee and this indicates that till that day she was member and her resignation was not accepted on 21st as alleged by the accused persons. According to him if on 21st November, her resignation was accepted, a letter could have been sent to her prior to meeting dated 23rd November informing that her resignation was accepted and therefore, she need not attend the meeting. According to him, no such intimation was given. Intimation about acceptance of her resignation was issued and received by her on 26th November, 2004. According to the learned

counsel, these facts go to point out that the minutes pertaining to the alleged meeting dated 21st November are forged and fabricated. These are the questions of the facts, which can not be gone into and sorted at in the Writ Petition.

6. It is admitted fact that the complaint was filed by the complainant through her son as duly constituted power of attorney holder and verification statement of her son was recorded and on the basis of that verification statement, process was issued on 08.02.2005 to the accused persons. Mr.Mundargi referred to the several parts of the complaint as also the verification statement itself to point out that the facts stated in the complaint as well as verification statement of the respondent no.3 were exclusively within the knowledge of the complainant herself and there is nothing to show that her son was also present alongwith her in the meeting dated 23rd November or that he was present when some conversation had taken place between herself and Chairman of the Managing Committee. The learned counsel contended that in view of these circumstances, verification statement was not valid and it could not be acted upon. In support of this, he placed reliance upon the judgment of this Court in **Shahnaz D'Souza v. Sheikh Ameer Saheeb & Anr. 2007(2)**

Bombay C.R.362 That was case under Section 138 of the Negotiable Instruments Act but the question of verification of the complaint was involved. The learned Single Judge of this Court referred to the authority of Rajasthan High Court of **Shambhu Dutt Shastri v. State of Rajasthan (1986) 2 W.L.N.713** and observed as follows:

> 7. It is now well settled, as held in the case of (Shambhu Dutt Shastri Vs. State of Rajasthan), (1986)2 W.L.N. 713 that:
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> "When a general power of attorney holder can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."
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> 8. The above view was followed in (Ram Prasad Vs. Hari Narain and others), A.I.R. 1998 Rajasthan 185 and by this Court in (Mamtadevi w/o Prafullakumar Bhansali Vs. Pushpadevi w/o Kailashkumar Agrawal and another), 2005 All.M.R.(Cri.) 3075 by observing that "Attorney Holder can act, appear and plead on behalf of a party and he can be a witness on behalf of the party".
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> 9. The view of the Rajasthan High Court has also been accepted by the Apex Court in the case of (Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others), 2004(4) Bom.C.R.(S.C.)76: A.I.R. 2005 S.C. 439. In para 21 of the judgment, in Mamtadevi w/o Prafullakumar Bhansali Vs. Pushpadevi w/o Kailashkumar Agrawal and another (supra), this Court has again reiterated that (1) filing of complaint by such person through power of attorney would be perfectly legal and competent, (ii) that the complainant alone

> being a witness of transaction has himself to depose in support of complaint either at the stage of issuance of process or whenever; (iii) if the transactions are witnessed by the power of attorney himself as an agent of the payee, such power of attorney alone can be a witness and his being a power of attorney cannot disentitle him from being a witness; (iv) when the transactions are witnessed by the complainant and power of attorney or any other witness or witnesses in the whole or in part, all such persons will have to be the witness of the case, and the power of attorney shall not be disentitled from being examined as witness just because he holds a power of attorney........"

7. There is no dispute about this legal position settled by the Rajasthan High Court, the Supreme Court and by this Court in number of cases. In view of the facts noted in the complaint, it is clear that certain transactions or the conversation, on which the complaint is based, had taken place between the complainant and the accused persons only and her son, who is power of attorney holder himself was not present nor he was party to those discussions. Therefore, he could not be a witness about those facts, which were within the exclusive knowledge of the complainant. In view of this he could not be a witness and he could not make verification statement in support of the complaint.

8. Section 200 of the Code of Criminal Procedure provides that a Magistrate taking cognizance of an offence on complaint shall examine upon oath the

complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. On the basis of this, under section 204 if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, he may issue summons or a warrant depending upon the nature of the case. In view of the provisions of Section 200, it is clear that the complainant and the witnesses are to be examined in support of the complaint. The respondent no.3 Ninad, who was duly constituted power of attorney for the complainant, was neither the complainant nor a witness. Merely because he was constituted power of attorney holder, he could not claim to be the complainant himself or witness of the facts which were not known to him but which were within the exclusive knowledge of the complainant. In view of this, it must be held that verification statement of the respondent no.3 was not verification statement made by the complainant or by witness who had personal knowledge of the fact. Therefore on the basis of such statement, the learned Magistrate could not proceed to issue process under Section 204.

9. In view of the legal position and facts of the

case, it must be held that process issued by the learned Magistrate was not proper. Therefore, issuance of process has to be quashed. However, this can not be stated about the complaint itself. Once the process is quashed, the complainant will be still at liberty to make verification statement before the Magistrate and thereafter, the Magistrate may proceed as per the law depending upon the facts and the evidence, which may be placed before him. Therefore, in my opinion, the proceeding in the said complaint can not be quashed but only process issued by the trial Court may be quashed.

10. In view of the facts and circumstances and the legal position discussed above, the order dated 9th February, 2005 passed by the learned Judicial Magistrate First Class, Pune issuing process to the accused persons in the criminal case no.149 of 2005, is hereby quashed. However, the complainant shall be at liberty to make verification statement before the Magistrate in the same complaint and thereafter, the learned J.M.F.C. may proceed as per the law.

11. It is made clear that all the rival contentions about the facts and other legal position are kept open.

12. In the said complaint, accused persons were granted bail by the learned Magistrate. The grant of bail was challenged by the complainant in Criminal Application no.2141 of 2005 under Section 482 of the Cr.P.C. mainly on the ground that the offence under Section 467 of the IPC is punishable with life imprisonment and the Magistrate had no power to grant bail. Writ Petition No.1137 of 2005 challenging the issuance of process itself is allowed and the order pertaining to the issuance of process is quashed.

Therefore, all other orders passed thereafter become infructuous. In the result, Criminal Application no.2141 of 2005 also becomes infructuous and stands disposed off accordingly.

(J.H.Bhatia,J.)